

PRACTICES AND PROCEDURES IN JUDGE MONTALI'S COURT
(Revised on January 30, 2004)

In addition to enforcing the Bankruptcy Local Rules for the Northern District of California ("B.L.R.") and the Federal Rules of Bankruptcy Procedure ("Rules"), Judge Montali has established certain practices and procedures in his court. Counsel and litigants appearing before Judge Montali should be aware of the following:

I. ORDERS AND JUDGMENTS

A. Obtaining an Order Shortening Time

A party seeking an order shortening time must comply with B.L.R. 9006-1. In particular, the party must submit a declaration describing the efforts made to obtain the consent of the opposing party to the order shortening time. A request for an order shortening time should be made in writing; when submitting the request and the proposed order to the Intake Staff, the moving party should specify that this is an emergency matter that should be submitted in the "red folder." If Judge Montali signs the order, his law clerk will contact the moving party and will send a copy of the signed order by facsimile. In general, Judge Montali will not require the opposing party to file any written response to a motion that is scheduled on shortened time, and opposition may be presented at the hearing.

Judge Montali does not require an order shortening time on a motion for interim authority to use cash collateral or obtain credit (including DIP financing). See Rule 4001(b)(2) and (c)(2) (hearing may be conducted within 15 days after service of motion to avoid immediate and irreparable harm to estate pending final hearing). To obtain a date and time for the initial hearing on a motion to use cash collateral or obtain credit, counsel should contact Ms. Virginia Belli, Courtroom Deputy/Calendar Clerk, at 415-268-2323 or Virginia_Belli@canb.uscourts.gov.

B. Procedures for Temporary Restraining Orders (TRO)

Judge Montali generally prefers at least 72 hours' notice to, and service of moving papers upon, opposing parties. Any request for a TRO (or other injunctive relief) requires an adversary proceeding. See Rule 7001(7). Accordingly, a complaint must be filed prior to the hearing. To obtain a date and time for a hearing on a request for a TRO, counsel should

contact Ms. Virginia Belli, Courtroom Deputy/Calendar Clerk, at 415-268-2323 or Virginia_Belli@canb.uscourts.gov.

C. Envelopes

The court invariably receives calls from counsel stating that an order has not been received; however, the automated docket system will reflect entry of the order and the failure of counsel to provide a self-addressed, stamped envelope for return of a conformed copy. To avoid such delays, counsel should ensure that a separate envelope is provided for the order.

D. Submission of Orders After Hearing

Judge Montali frequently receives proposed orders from parties who have not complied with B.L.R. 9021-1 and 9022-1. The following addresses common errors, and is not a substitute for reading the rules.

A proposed order submitted after a hearing should contain the signatures of any other counsel who appeared at the hearing, approving it as to form, or else a proof of service evidencing service of the proposed order on all such counsel. Orders not approved as to form will ordinarily be lodged for 7 days after service, but this is not a guarantee that they will be held for that period.

The party submitting a proposed order or judgment should provide copies, stamped and addressed envelopes (including a return envelope), a list of parties to be served, and a form of notice of entry of order for the clerk to use. Parties are frequently uncertain who must be served. Under Rule 9022 and B.L.R. 9022-1, notice of entry of orders or judgments must be served by the clerk on all "contesting parties" and the United States Trustee (and such other parties as the court directs). Judge Montali interprets "contesting parties" to mean (1) any identified, named party against whom relief is sought (including the debtor(s) and debtor(s)' counsel for all orders in response to motions for relief from the automatic stay) unless that party (i) has stipulated in writing or in open court to the relief sought (not just the more traditional "approved as to form"); or (ii) was present when the order or judgment was signed in open court, and (2) to the extent relief is sought on notice to creditors generally, only those creditors who file a written objection or request for a hearing, or who appear at the hearing and object to the relief sought, unless such written or oral opposition has been expressly withdrawn. Other parties need not be served. Envelopes and extra copies submitted in addition to

those required by the rule may be discarded by the court.

II. SPECIFIC MOTIONS AND ORDERS

A. 522(f)(1)(A): Avoiding a Judgment Lien that Impairs an Exemption

Before he will sign an order avoiding a judgment lien under 11 U.S.C. § 522(f)(1)(A), Judge Montali requires a declaration from the debtor or some other appropriate offer of proof setting forth the grounds for avoiding the lien. In particular, the declarant(s) should provide the following information: the value of the encumbered property, the amount and nature of the debtor's exemption, the extent of the impairment, and the amount of the judgment lien and all other liens encumbering the property (see 11 U.S.C. § 522(f)(2)(A)). The debtor should also disclose any other facts supporting his or her contention that 11 U.S.C. § 522(f)(1) is applicable.

B. Default Judgments In Adversary Proceedings

When requesting a default judgment in an adversary proceeding, the moving party must submit a proof of service showing that the request was served on the non-responding defendant. Except in certain matters (e.g., trustee avoiding actions, 11 U.S.C. § 523(a)(2)(C) causes, and others as determined on a case-by-case basis), a plaintiff seeking a default judgment must schedule a "prove-up" hearing (see Fed. R. Civ. P. 55(b)(2) and Rule 7055) and serve notice of the hearing on the defendant at least fifteen days prior to the hearing. Any witnesses for the plaintiff must appear personally; the defaulting defendant is entitled to cross-examine the witness but is not permitted to present its own evidence or witnesses. The court will consider declarations only if the defaulted defendant agrees.

C. Sale Motions: Section 363(m) Good Faith Determinations

Burden of Proof; Discretionary Finding: Any bidder requesting a judicial determination under 11 U.S.C. § 363(m) that its purchase of assets is in good faith (in an order authorizing a sale under section 363(b) or by separate order) has the burden to establish such good faith. This court has discretion to refuse to make such a finding, and the preclusive effect of such a finding may be limited. T.C. Investors v. Joseph (In re M Capital Corp.), 290 B.R. 743, 748-49 (9th Cir. BAP 2003).

Evidentiary support: A bidder seeking a section 363 good faith determination must file a written declaration (or, if the bidder is not an individual, a declaration of its responsible officer or agent with personal knowledge) demonstrating the proposed bidder's good faith, including disclosure of:

1. The bidder's prepetition and postpetition relationship with other bidders, the debtor, major creditors or equity security holders in the case, or any of the debtor's officers, directors, agents, or employees;

2. The bidder's expected relationship after the sale with the debtor's present or former officers, directors, agents, or employees (including whether any offers of employment or compensation have been made or will be offered to debtor's present or former officers, directors, agents, or employees);

3. Whether any consideration is contemplated to be transferred or has been transferred by bidder in connection with the sale to any person other than the debtor (or the trustee of the debtor's estate); and

4. The absence of fraud or collusion between the bidder and any other bidders or the debtor's officers, directors, agents or employees, or any attempt to take unfair advantage of other bidders.

For further guidance regarding Judge Montali's policies regarding good faith findings, see M Capital Corp., 290 B.R. at 748-49.

D. Sale Motions: Section 1146(c) Exemptions From Stamp and Transfer Taxes

Judge Montali agrees with the reasoning of Baltimore County v. Hechinger Liquidation Trust (In re Hechinger Investment Co. of Del., Inc.), 335 F.3d 243 (3d Cir. 2003), and normally will not enter an order approving a sale under section 363 that attempts to incorporate section 1146(c).

E. Motions to Sell Free and Clear of Liens

Judge Montali strictly enforces B.L.R. 6004-1.

F. First Day Motions

In the initial days of a case, Chapter 11 debtors frequently

file financing motions, motions to pay prepetition wages of employees, or other motions that may have a significant effect on the future administration of the estate. Judge Montali requires that such motions be accompanied by declarations signed by representatives of the debtor with personal knowledge of the facts asserted and setting forth adequate financial information to put the motion(s) in context. The moving party should provide sufficient financial information to enable Judge Montali to assess the impact of the requested relief on unsecured creditors.

Specifically, Judge Montali requires information about the value of a debtor's assets, and the extent to which they are encumbered; the amount of current and long term liabilities, with specific mention of debts entitled to priority under 11 U.S.C. § 507; the current cash situation; the amount of prepetition wages owed and to whom (by name and position/occupation with the debtor and amount owed); the nature of the connections (if any) between the debtor and any party providing financing; and, unless unknown, the Chapter 11 exit strategy of the debtor (e.g., sale as a going concern, liquidation of assets, continuation of business with infusion of capital, etc.). See also the court's Guidelines for Cash Collateral and Financing Stipulations.

III. OTHER PRACTICES AND PROCEDURES

A. Adversary Proceeding Status Conference Reports

Judge Montali does not normally require status conference reports in adversary proceedings.

B. Calendaring Matters

Judge Montali utilizes "open calendar" procedures. Go to <http://www.canb.uscourts.gov> and click on the "Division Procedures" button and then the "San Francisco Open Calendar Procedure" link. Parties or counsel may also calendar matters by contacting Ms. Virginia Belli, Courtroom Deputy/Calendar Clerk via telephone at 415-268-2323 or e-mail at Virginia.Belli@canb.uscourts.gov. **Note regarding Pacific Gas and Electric Company ("PG&E"):** the open calendar procedure is superseded by the Case Management Order (Revised June 14, 2001), available at the above web site under the PG&E hyperlink.

C. Telephonic Appearances

Judge Montali allows counsel to appear telephonically on most matters. Go to <http://www.canb.uscourts.gov> and click on

the "Judges' Procedures" button, then select "Procedures For Appearances By Telephone" under "San Francisco Division." Counsel must make arrangements with Ms. Virginia Belli, Courtroom Deputy/Calendar Clerk (415-268-2323 or Virginia_Belli@canb.uscourts.gov), at least 72 hours before they intend to appear telephonically. Calls outside of the 415 area code are normally placed through 1-800-COLLECT, and counsel must ensure that they can accept a collect call from the court at the time of the hearing. If counsel's telephone has an automatic system in place to block collect calls, the court may treat the failure to accept the call as a non-appearance by counsel. **Note regarding PG&E:** the telephonic appearance procedure is superseded by the Case Management Order (Revised June 14, 2001), available at the court's web site under the PG&E hyperlink.

D. Communications With Chambers' Staff

Rule 9003(a) prohibits ex parte communications with the court concerning matters affecting a particular case or proceeding. Rule 5-300(C) of the California Rules of Professional Conduct specifies that for disciplinary purposes, a contact with Judge Montali's law clerk constitutes a contact with the judge. No attorney or party may initiate contact with the judge or his law clerk in violation of Rule 9003(a). Improper ex parte communications may include letters or e-mails to the court (especially where copies have not been provided to opposing parties and the United States Trustee) and telephone calls to the court. Individual cases may not be discussed with Judge Montali's law clerk or judicial assistant except to inform the court that an ex parte request or a form of order is opposed, that an emergency pleading or request for order shortening time is being submitted, that a Chapter 11 plan proponent intends to go forward with a disclosure statement or confirmation hearing, or that a calendared matter has been settled or is being re-scheduled. (In the event of a settlement or re-scheduling, counsel should also contact Ms. Virginia Belli, Courtroom Deputy/Calendar Clerk, at 415-268-2323 or Virginia_Belli@canb.uscourts.gov.)

To check on the status of an order, call the clerk's office at 415-268-2300. Before doing so, counsel should wait seven to ten days after submission of the order (see B.L.R. 9021-1) and should check PACER to determine the status of the order. To find out how to utilize PACER, go to <http://www.canb.uscourts.gov> and click on the Information Manual button and then the PACER hyperlink.

E-mail should not be sent to Judge Montali, his law clerks,

or his judicial assistant without prior approval.

E. Obtaining Continuances

Trials: Judge Montali will grant continuances of trials for good cause only, even when the parties stipulate to a continuance. A request for continuance must be made by noticed motion or by a written stipulation stating the reason for the requested continuance. Parties requesting a continuance of a trial should comply with B.L.R. 9006-1.

Motions: If parties agree to continue a scheduled hearing on a motion, they merely need to contact Ms. Virginia Belli (415-268-2323 or Virginia_Belli@canb.uscourts.gov) to inform her of the new date and time. No written stipulation is necessary. A party requesting a continuance that is opposed should comply with B.L.R. 9006-1.

F. Discovery Disputes

Judge Montali will generally hold a telephonic conference to resolve a discovery dispute in lieu of formal motions to compel or quash discovery. (See B.L.R. 1001-2(a)(46) and Civil L.R. 37-1(a) and (b)). Parties should comply with the procedures set forth in Civ. L.R. 37-1. To schedule a telephonic conference regarding a discovery dispute, counsel should contact Ms. Virginia Belli, Courtroom Deputy/Calendar Clerk, at 415-268-2323 or Virginia_Belli@canb.uscourts.gov.

Any request for sanctions relating to a discovery dispute must be made by separate noticed motion.

G. Request To Seal Documents

A party wishing to file a document under seal should place each copy of the confidential document being filed into a separate sealed envelope and attach a copy of the front page of the confidential document to the front of the envelope. In the upper left hand margin, state "Sealed Pursuant to Order Dated ____." If a protective order already exists permitting the document to be filed, the date and title of that order should be provided. Otherwise, the court will fill in the date when and if it signs an order permitting the document to be filed under seal.

If the document is not protected by a pre-existing protective order, the party should file and serve a separate motion and a proposed order for authority to submit the document under seal. See Fed. R. Bankr. P. 9018. Sealing filed documents

is disfavored under the law and by this court (see 11 U.S.C. § 107); accordingly, the motion must satisfactorily explain why the court should disregard the policy of open access to public documents. Parties opposing such a request should respond as soon as possible, since the court will normally act on any such matter promptly and without a hearing.

H. Employment of Auctioneers and Brokers

Judge Montali will not allow auctioneers to recover labor costs or to charge a buyers' premium. Any application to employ an auctioneer should reflect the auctioneer's agreement not to charge such costs and premiums. Similarly, Judge Montali will not allow real estate brokers representing the estate (as seller) to represent buyers. See 11 U.S.C. § 327(a) (trustee may employ "professional persons, that do not hold or represent an interest adverse to the estate"). Any application to employ a real estate broker should reflect the agreement of the broker that he or she will not represent the buyer.

I. Fee Applications in Chapter 13 Cases

Even though Guideline #7 of the Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees for the United States Bankruptcy Court for the Northern District of California (go to <http://www.canb.uscourts.gov> and click on the "Guidelines" button, then select "Guidelines for Compensation and Expense Reimbursement of Professional and Trustees") does not specifically apply to fee applications in Chapter 13 cases, Judge Montali does require counsel in Chapter 13 cases to provide their clients with the letter described in that Guideline.

J. Fees Generally

Travel: Judge Montali generally will allow up to two hours of compensation for non-working airplane travel time, to account for inevitable delays for security and administration involved in air travel. Other air travel time is not likely to be compensable, per Guideline 17 of the Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees.

Conflicts Checks / Ethical Walls / Change of Firms: Judge Montali expects counsel to write off, and will normally disallow, time spent identifying, clearing and avoiding conflicts and complying with Bankruptcy Rule 2014(a). Such time is not very different from a firm absorbing the time expended on its own efforts to secure a new client, for which Judge Montali doubts any professional would bill. For the same reasons, he expects

counsel to write off, and normally will disallow, time spent by professionals who change offices or firms, and need to clear conflicts, set up new files, brief new attorneys, or perform other tasks in connection with the transition.

Retainers: Judge Montali does not require retainers to be held in a trust account, unless that is the agreement between the attorney and the client.

K. Disclosure Statement Hearings

Judge Montali strictly enforces B.L.R. 3017-1. In particular, a competent witness for the plan proponent must be present at the hearing and counsel for the proponent must notify Chambers by telephone at least three business days prior to the hearing that the hearing will go forward. The court will normally refuse to proceed with the hearing if this call is not made or the debtor or other plan proponent does not appear.

L. Stipulations for Relief from Stay

Generally, Judge Montali will not approve a stipulation for relief from stay that purports to be effective in any subsequent case filed by the debtor. Judge Montali will approve provisions that grant relief from the stay on ten days' notice to debtor and debtor's counsel if the debtor defaults on agreed payments under the order before debtor becomes post-petition current. If, however, the debtor defaults after becoming post-petition current, the movant must re-set the motion on ten days' notice.

M. Compliance With Local Rules

Counsel and parties should comply with all local rules. In particular, in order to avoid delays in the processing of orders, parties should comply with B.L.R. 9014-1(b)(4) (when requesting entry of order by default) and B.L.R. 9022-1 (when relief is sought against a particular person or entity that has not stipulated to the relief - see section I(D) above entitled "Submission of Orders After Hearing").

N. Conflicts checks

Judge Montali does not expect counsel to run every creditor and party in interest through a conflicts check. He does expect counsel to use professional judgment in determining the scope of an appropriate conflicts check. At a minimum Judge Montali believes that counsel should include in their conflicts check any party who has a major interest in the case (e.g., major unsecured

creditors, secured creditors, major equity security holders / owners, officers and directors, landlords / lessors, and other professionals retained in the case). Counsel should disclose potential conflicts with any such party, including anticipated future conflicts.

O. Temporary attorneys, paralegals and other personnel

Judge Montali permits the engagement of temporary attorneys, paralegals and other personnel, including both short term employees and independent contractors. This is a common and accepted practice, and therefore any firm whose employment is authorized may retain temporary personnel without the need for a separate employment application. Each order authorizing employment will be deemed to include a "further order," within the meaning of the applicable rules, authorizing the retention of temporary personnel. See Fed. R. Bankr. P. 2014(b) (if firm is employed, "regular associate" may act as attorney without "further order" of court), 9001(9) (definition of "regular associate").

Nevertheless, the authorization to retain temporary personnel does not alter the requirement to adhere to the applicable ethical rules, including the rules governing conflicts of interest. Unless otherwise noted in the employment application papers, Judge Montali will presume that any temporary personnel will be subject to at least the same safeguards as those used for other lateral personnel to determine whether their past engagements at other firms (a) may have exposed such individuals to confidences or secrets of an adverse party, (b) might have created a duty of loyalty to an adverse party, or (c) raise any other conflicts issue.

In addition, Judge Montali is aware that temporary personnel may work for more than one firm concurrently, or may have an ongoing relationship with more than one firm. These arrangements may increase the potential for conflicts of interest arising from present or future engagements. On the other hand, temporary personnel may have a restricted involvement in the day to day operations of each firm, and therefore they may be screened somewhat from exposure to confidential or secret information. See County of Los Angeles v. District Court (In re County of Los Angeles), 223 F.3d 990 (9th Cir. 2000). Judge Montali will expect any firm retaining temporary personnel to bear these factors in mind when establishing conflicts procedures, ethical screens, or other safeguards.